

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

In re ENRON CORPORATION SECURITIES)
LITIGATION)

This Document Relates To:)

MARK NEWBY, *et al.*, individually and on)
behalf of all others similarly situated,)

Plaintiffs,)

vs.)

ENRON CORP., *et al.*)

Defendants.)

THE REGENTS OF THE UNIVERSITY OF)
CALIFORNIA, *et al.*, individually and on)
behalf of all others similarly situated,)
Plaintiffs,)

vs.)

KENNETH L. LAY, *et al.*)

Defendants.)

United States Courts
Southern District of Texas
FILED

AUG 30 2002

C.H.

Michael A. Milby, Clerk

Civil Action No. H-01-3624
(Consolidated)

**OPPOSITION TO LEAD PLAINTIFF THE REGENTS' MOTION FOR PROTECTIVE
ORDER BY DEFENDANTS BANK OF AMERICA CORPORATION, CREDIT SUISSE
FIRST BOSTON CORP., CITIGROUP, INC., DEUTSCHE BANK AG, BARCLAYS PLC,
MERRILL LYNCH & CO., INC., J.P. MORGAN CHASE & COMPANY, CANADIAN
IMPERIAL BANK OF COMMERCE AND LEHMAN BROTHERS HOLDINGS INC.**

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I. INTRODUCTION

The Regents' motion for a protective order is premature both because of the discovery stay in place and because plaintiffs have refused to confer on several of the issues raised in their motion. Moreover, the motion grossly misrepresents both the discovery sought by the bank defendants¹ and the Regents' own level of cooperation.

Contrary to the Regents' motion, defendants never sought 11 depositions of the Regents, nor have defendants "refuse[d] to reduce the scope of their class certification discovery." (Lead Plaintiff The Regents' Motion for Protective Order (hereinafter "Regents' Mot.") at 1, 2.) Defendants initially sought only seven depositions of Regents representatives and agreed to reduce that number to four and then reassess whether more were needed. Defendants also agreed to work with plaintiffs on the scheduling and location of depositions. Nevertheless, the Regents refuse to permit defendants to depose more than one representative *and further insist that they will choose that deponent pursuant to Rule 30(b)(6)*. The Regents have absolutely refused any compromise in that position.

The Regents also have objected to virtually every document request propounded by defendants and never produced a single document before the Court clarified that all discovery is stayed pursuant to the Private Securities Litigation Reform Act (the "PSLRA"). In violation of Fed. R. Civ. P. 26(c) and Local Rule 7.1, the Regents never even sought to confer with defendants concerning the document requests before filing their motion. Moreover, the Regents' objections are entirely baseless — the documents sought by defendants are not privileged and are

¹ Bank of America Corporation, Credit Suisse First Boston Corp., Citigroup, Inc., Deutsche Bank AG, Barclays PLC, Merrill Lynch & Co., Inc., J.P. Morgan Chase & Company, Canadian Imperial Bank of Commerce, and Lehman Brothers Holdings Inc., hereinafter "defendants."

directly relevant to determining whether the Regents satisfy the typicality and adequacy requirements of Fed. R. Civ. P. 23.

For these reasons, discussed more fully below, the Regents' motion for a protective order should be denied.

II. BACKGROUND

This Court set a September 2, 2002 cutoff for class certification discovery. (Docket 326.) On July 3, 2002, approximately one week after briefing on the motions to dismiss was completed (and only two days after the commencement of class discovery), defendants served plaintiffs with their First Request for Production of Documents Relating to Class Certification. On July 23, 2002, defendants served a deposition notice scheduling depositions for August 12-16. Defendants sought to depose each individual proposed class representative and officials of the institutional proposed class representatives. The number of depositions sought by defendants is a direct function of the number of class representatives named.²

To comply with the Court's scheduling order, defendants were forced to schedule several depositions simultaneously. Defendants, however, agreed to work with plaintiffs regarding the scheduling, location and number of depositions. On July 31, 2002, Gregory Markel, counsel for Bank of America who was coordinating discovery on behalf of defendants, wrote to plaintiffs' counsel Helen Hodges agreeing to cooperate with plaintiffs on the scheduling and location of depositions so long as plaintiffs produced the documents that defendants had requested sufficiently in advance of the depositions to give defendants a reasonable opportunity to review them:

² Fifteen proposed class representatives have been named in this case, two of whom withdrew after the deposition notices were served.

With respect to the logistics of class discovery depositions, we are happy to negotiate mutually convenient times and locations. Please provide me with Plaintiffs' suggested dates and times for each of the depositions we have noticed. We will consider any reasonable request that provides us with an adequate opportunity to review all materials responsive to our document requests and enables us to complete class discovery depositions within the schedule provided by the Court. In addition, in light of the fact that the scheduling order does not require the filing of Plaintiffs' class certification brief until October 1, we would be willing to consider any request by Plaintiffs to move some of the noticed depositions into early September, subject to approval of the Court.

(Ex. A (Markel letter).) The Regents' counsel's own correspondence reflects that, based on information the Regents provided, Mr. Markel agreed "to talk with other defense counsel and try to propose a compromise" regarding the number of representatives of the Regents that would be deposed. (Ex. B (Hodges letter 8/7/02).) That same letter also shows that, to further facilitate negotiations, defendants "agreed to adjourn the depositions currently set for August 12, 13 and 14...." (*Id.*)

On August 2, 2002, plaintiffs served their written responses to the defendants' document requests. Although the Regents represent in their motion that they are "responding to 26 document discovery requests," the fact is that the Regents' response (like the responses of all other plaintiffs) consists primarily of objections. (Ex. C.) Not one of the plaintiffs, including the Regents, has produced a single document.

On August 7, this Court entered an Order stating that "all discovery is stayed, pursuant to the PSLRA until this Court has ruled on the pending motions to dismiss." (Docket 983.) Both plaintiffs and defendants understand this Order to stay discovery on class certification as well as on the merits. Obviously, if the Court grants the bank defendants' pending motions to dismiss (as defendants believe it should), it will be unnecessary for the bank defendants to take class discovery and the Regents' motion for a protective order will be moot. Nevertheless, because

talks were already underway, defendants attempted to continue conferring regarding the various depositions.

In this regard, while defendants initially noticed depositions for seven representatives of the Regents, defendants agreed to reduce that number to only "three or four representatives from the Regents," and then to reassess whether additional depositions were necessary. (Ex. D (Hodges letter 8/9/02).)³ As discussed below, the specific representatives of the Regents whom defendants are seeking to depose were carefully chosen as having information central to assessing whether the Regents satisfy the typicality and adequacy requirements of Rule 23.

Rather than accept any compromise, the Regents refused to produce for deposition any representative but Mr. Jeffrey Heil. In essence, the Regents' position is that defendants are entitled to depose only one representative of the Regents, and the Regents get to choose that representative pursuant to Rule 30(b)(6).

The Regents then summarily cut off the discussions and stated that they would "be filing a motion for a protective order regarding the scope of class certification discovery." (Ex. D (Hodges letter 8/9/02); Ex. E (Markel Aff.)) Defendants advised the Regents that any such motion would be premature because of the PSLRA's discovery stay and because there had been no conference concerning the document discovery and the depositions of other class representatives (Ex. E (Markel Aff.)), but the Regents filed their motion anyway.⁴

³ The Regents are simply misleading the Court by stating that defendants are seeking eleven depositions of the Regents. They arrive at that number by adding the four categories of information listed in defendants' Rule 30(b)(6) notice to the seven individuals specifically named for deposition even though the Regents have identified only one person, Mr. Jeffrey Heil, in response to that Rule 30(b)(6) notice, and Mr. Heil was already one of the specifically identified witnesses. Moreover, the Regents are fully aware that defendants have already offered to reduce the number of depositions of the Regents to four.

⁴ Further, the Regents' motion is premature to the extent it seeks to limit defendants to the deposition of a single representative of the Regents when the Regents have not yet produced any documents indicating which individuals have relevant information.

III. ARGUMENT

A. **The Requested Discovery Is Directly Relevant To And Necessary For The Rigorous Class Certification Analysis.**

"[T]he party seeking [class] certification bears the burden of establishing that *all* requirements of Rule 23(a) have been satisfied." *Berger v. Compaq Computer Corp.*, 257 F.3d 475, 481 (5th Cir. 2001), *reh'g en banc denied*, 279 F.3d 313 (5th Cir. 2002) (per curiam). Among other things, plaintiffs are required to establish that (i) their claims are typical of the claims of the class, and (ii) that plaintiffs will fairly and adequately protect the interests of the class. Fed. R. Civ. P. 23(a).

The typicality requirement "focuses on the similarity between the named plaintiffs' legal and remedial theories and the theories of those whom they purport to represent." *Griffin v. GK Intelligent Sys., Inc.*, 196 F.R.D. 298, 301 (S.D. Tex. 2000). The existence of a potentially unique defense renders a plaintiff atypical, even if the ultimate success of the defense is not clear. *Warren v. Reserve Fund, Inc.*, 728 F.2d 741, 747 (5th Cir. 1984). "The rationale behind this hesitance [to appoint a plaintiff subject to a unique defense] is a concern that representation of the class will suffer if the named plaintiff is preoccupied with a defense which is applicable only to himself." *Id.*

The adequacy requirement, on the other hand, "mandates an inquiry into [1] the zeal and competence of the representative[s]' counsel and ... [2] the willingness and ability of the representative[s] to take an active role in and control the litigation and to protect the interests of absentees[.]" *Compaq*, 257 F.3d at 479 (brackets, ellipses in original) (quoting *Horton v. Goose Creek Indep. Sch. Dist.*, 690 F.2d 470, 484 (5th Cir. 1982)). "The adequacy inquiry also 'serves to uncover conflicts of interest between the named plaintiffs and the class they seek to represent.'" *Id.* at 479-80 (quoting *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 625 (1997)).

Although a court does not decide the merits of the case at the class certification stage, it must conduct a "rigorous analysis" to determine whether the typicality and adequacy prerequisites of Rule 23(a) are met. *Castano v. Am. Tobacco Co.*, 84 F.3d 734, 740 (5th Cir. 1996). The Supreme Court has made clear that the requirements of "typicality. . . , [and] the adequacy of the representative" are "intimately involved with the merits of the claims." *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 469 n.12 (1978).

While the Regents attempt to present class certification as a *fait accompli*, it is anything but. Contrary to the Regents' suggestion, the lead plaintiff determination does not foreclose inquiry into adequacy and typicality at the class certification phase because "only *potential plaintiffs* may be heard regarding appointment of a lead plaintiff." *Gluck v. Cellstar Corp.*, 976 F. Supp. 542, 550 (N.D. Tex. 1997). The initial lead plaintiff determination is made only on a preliminary showing based on which plaintiff "has the largest financial interest in relief sought by the class." *Id.* at 546. Although defendants have no input into who is designated lead plaintiff, they are clearly entitled to challenge whether that plaintiff is an adequate class representative.

Nor does merely alleging securities fraud make class certification a foregone conclusion. Class certification is not, as the Regents contend, merely "a procedural determination [where] plaintiffs' allegations are presumed to be true." (Regents' Mot. at 14.) On the contrary, "[c]ertifying classes on the basis of incontestable allegations in the complaint moves the court's discretion to the plaintiff's attorneys—who may use it in ways injurious to other class members, as well as ways injurious to defendants. Both the absent class members and defendants are entitled to the protection of independent judicial review of the plaintiff's allegations." *Szabo v. Bridgeport Machs., Inc.*, 249 F.3d 672, 677 (7th Cir. 2001). Thus, as the Supreme Court has

cautioned, in deciding whether to certify a proposed class, "it may be necessary for the court to probe behind the pleadings before coming to rest on the certification question." *Gen. Tel. Co. v. Falcon*, 457 U.S. 147, 160 (1982).

Because the required analysis cannot be undertaken without adequate information regarding all the elements required for class certification, courts have long recognized the necessity of discovery before making a decision on class certification. *See, e.g., Chateau de Ville Prods., Inc. v. Tams-Witmark Music Library, Inc.*, 586 F.2d 962, 966-67 (2d Cir. 1978) (reversing grant of class certification where court refused to permit defendant to take class certification discovery); *see also Adams v. Brookshire Grocery Co.*, No. 6:98CV00462, 1999 U.S. Dist. LEXIS 21907, at *20 (E.D. Tex. Feb. 8, 1999) (recognizing "that a certain amount of discovery was usually necessary to determine the proper scope of the class action issue") (citing *Stewart v. Winter*, 669 F.2d 328, 331 (5th Cir. 1982)). Defendants are entitled to discovery of any information that is reasonably calculated to show whether plaintiffs meet the requirements for maintaining a class action under Rule 23. *See Fed. R. Civ. P. 23(a)*; *see also Brinkerhoff v. Rockwell Int'l Corp.*, 83 F.R.D. 478, 480 (N.D. Tex. 1979).

Nevertheless, the Regents essentially ask this Court to presume that class certification is proper and that the Regents are an adequate class representative based on nothing more than the Regents' unsubstantiated and conclusory assertions. (*See Regents' Mot.* at 4 and 15 (referring to Regents as "a model Lead Plaintiff"), 4 ("no one can legitimately argue a Class should not be certified"), 6 ("paradigmatic Lead Plaintiff"), 16 ("parties should be stipulating to class certification").) The Fifth Circuit in *Compaq*, however, recently reversed a class certification order because the district court made exactly that error:

[T]he district court erred in two respects. First, it improperly shifted the burden of proof to the defendants by adopting a presumption that the class representatives

and their counsel were adequate in the absence of specific proof to the contrary. Second, it applied an impermissibly lax standard for adequacy that ignores the PSLRA's mandate that class representatives, and not lawyers, must direct and control the litigation.

Compaq, 257 F.3d at 480-81. The Fifth Circuit further noted that:

[T]he district court's presumption inverts the well-established rule that the party seeking certification bears the burden of establishing all elements of rule 23(a). Even more unsettling is that the district court's presumption ignores the constitutional dimensions of the adequacy requirement, which implicates the due process rights of all members who will be bound by the judgment.

Id. at 481. Thus, the Court may not simply accept the Regents' assertion that they or any other named plaintiff are an adequate class representative or that their claims are typical of those of the class.

**B. The Representatives Of The Regents The Bank Defendants
Seek To Depose Have Relevant And Discoverable Information.**

Defendants are presently seeking to depose four individual representatives of the Regents. Under Rule 26(b), a party is entitled to discovery regarding any non-privileged matter that is relevant to the subject matter of the proceeding and that appears reasonably calculated to lead to the discovery of admissible evidence. Plainly, the individuals discussed below have knowledge of non-privileged matters relevant to class certification, and their depositions are reasonably calculated to lead to the discovery of admissible evidence.

Judith Hopkinson or Gerald Parsky. Defendants noticed both of these individuals for deposition but have subsequently offered to depose only one of them initially. (Ex. E.) Neither Ms. Hopkinson nor Mr. Parsky has given an affidavit denying any knowledge of facts relevant to class certification.

Ms. Hopkinson is a member of the Board of Regents and was the Chairperson of the Regents' Committee on Investments, which establishes the Regents' investment policies. (Ex. E, F.) She is currently the Chairperson of the Committee on Finance, which authorized the filing of

this lawsuit. (Ex. G, H.) Mr. Parsky is also a Board member. He was the Vice-Chairperson of the Committee on Investments, is currently the Chairperson of that Committee and is also a member of the Finance Committee. (Ex. E, G, H.) According to the Bylaws of the Regents of the University of California, the Committee on Investments shall, among other things:

- "Manage the investments and investment properties of the [Regents]."
- "Authorize ... ; the purchase, sale, transfer or exchange of bonds, stocks, and other securities;"
- "By appropriate resolution or resolutions, at all times maintain in force a system of custodianship of all securities."
- "Report periodically to the Board concerning the investment operations of the University."

(Ex. I.) These individuals must "protect the security of the University's pension and endowment funds" and "establish management guidelines, reporting procedures, benchmark policies and the general parameters for how the portfolio's assets are distributed into a variety of domestic and international stocks." (Ex. J.) Significantly, the Investment Committee revised these policies in March 2000 to ensure that the portfolio is diversified and that exposure to risk is minimized. Individuals such as Ms. Hopkinson and Mr. Parsky, therefore, should have knowledge regarding those policies and their implementation. Members of the Board of Regents should also have knowledge concerning the replacement of the former treasurer, Patricia Small, who authorized the initial purchases of Enron stock. (Regents' Ex. G.)

In addition, as members of the Board of Regents, Ms. Hopkinson and Mr. Parsky should have information *uniquely* available to Board members. In particular, they should have been involved in the Board's decisions to retain counsel, to file this lawsuit as a class action and to undertake the burden of acting as a class representative by controlling the litigation. This

information is critical to class certification as it relates to adequacy of representation. The Regents have provided nothing indicating that anyone else can address these critical issues.

Jeffrey E. Heil. Mr. Heil is the Managing Director for Public Equity Investments. There is no dispute that defendants are entitled to depose Mr. Heil; indeed, he is the person the Regents are tendering under Rule 30(b)(6). Defendants are agreeable to deposing Mr. Heil first as the Regents request. Defendants, however, cannot agree to the Regents' demand that Mr. Heil be the only representative of the Regents that defendants will depose.

While Ms. Hodges' affidavit characterizes Mr. Heil as "the person most knowledgeable concerning The Regents' purchase of Enron stock" (Hodges Aff. ¶ 5), it does not say that Mr. Heil knows about anything else. The purchase of stock is hardly the only issue relevant to class certification. That issue only partially addresses typicality and has little to do with adequacy of representation. Mr. Heil's affidavit does not even profess knowledge with regard to all of the following categories of information listed in defendants' Rule 30(b)(6) deposition notice:

1. Purchases or sales or holding of Enron-Related Securities, Investments or Contracts by such party, and the reasons for each decision to purchase or to sell or to hold, including the due diligence conducted prior to each such decision;
2. The investment strategy, criteria or objectives of such party during the Class Period, including the authority to make changes to such investment strategy, criteria or objectives;
3. The decision of such party to become a party or named representative of a class or putative class in this action, including all actions taken to date to manage and control the prosecution of this action;
4. Any class action lawsuit brought by such party or its designated representative, in which such party or its designated representative was named as a party or named representative of a class or putative class.

Nothing in Mr. Heil's affidavit indicates he has any knowledge of the last two categories of information whatsoever. (*See Heil Aff.*) Yet that information clearly relates directly to "the

willingness and ability of the representative[s] to take an active role in the litigation and to protect the interests of absentees." *Compaq*, 257 F.3d at 479.⁵

David Russ. Mr. Russ is the Treasurer and Vice-President for Investments of the Regents. Mr. Heil reports to Mr. Russ. Like the other individuals defendants seek to depose, Mr. Russ has not given an affidavit denying knowledge of relevant facts, nor could he, for obvious reasons. According to the Treasurer's Annual Report,

[t]he Treasurer of The Regents is responsible for managing the investments and cash for the University of California System.... The Treasurer's Office carries out these activities under the policies established by the Investment Committee of The Regents of the University of California.

(Ex. F.) The Regents argue that Mr. Russ should not be deposed because he was not hired until April 2001, after the Regents bought Enron stock. But the Regents ignore the fact that Mr. Russ was in control for seven months in 2001, during which the Regents decided to *sell* Enron stock. Indeed, Mr. Heil's affidavit concedes it was Mr. Russ who *approved* the Enron stock sales in November 2001. (Heil Aff. ¶ 7.)

Significantly, the Treasurer's office sold a portion, *but not all*, of its Enron holdings on November 14, 2001 during Mr. Russ's tenure. (*See* Regents' Ex. H at 2.) Mr. Russ should have knowledge of the basis for the decision to sell some, but not all, of the Enron holdings at that time. During the same period, Mr. Russ was in charge of implementing the Board's new asset allocation plan. (Ex. F.) He is identified in a report from the "Office of the President News Room" titled "Update on UC's Enron Investments and Lawsuit" as one of the key individuals

⁵ The Regents' own motion demonstrates that these are critical issues. For example, the Regents' motion repeatedly makes unsubstantiated assertions regarding adequacy of representation, such as: "The Regents actively monitors the litigation and Lead Counsel's prosecution strategy, reviewing all pleadings and conducting a weekly conference call with Lead Counsel." (Regents' Mot. at 15.) Who does this? Is it someone qualified? Why was that person chosen? Is it a senior person with decision-making authority? To whom does that person report? Does he or she keep the senior officials informed? Clearly these issues are important to adequacy of representation, and defendants are entitled to inquire into them.

responsible for managing the University's investments. (Ex. J.) He has knowledge of the "portfolio risk management processes ... to manage and control investment risk" for the Regents. (Ex. F.)

Randolph Wedding. Mr. Wedding is the Managing Director of Fixed Income Portfolios for the Regents. The Regents oppose the deposition of Mr. Wedding because the Regents never invested in Enron bonds. Defendants, however, are entitled to explore the reasons for the decision not to invest in Enron bonds (which are clearly securities covered by plaintiffs' allegations) while at the same time the Regents decided to invest in Enron stock.

In sum, the four individuals from the Regents whom defendants seek to depose all have knowledge directly relating to class certification issues. Because it is clear that no single individual can address all of the issues relevant to class certification, defendants should be permitted to take all of these depositions.⁶

C. Defendants are Not Barred From Deposing More Than One Representative of the Regents.

The Regents first seek to avoid the depositions of any of their representatives except Mr. Heil by characterizing the depositions sought as "Apex" depositions. As an initial matter, the Regents have failed to show why any of the depositions sought by defendants qualify as "Apex" depositions. Defendants have not sought to depose, for example, the President of the University. Further, individuals do not qualify as "Apex" level executives simply because they have been

⁶ Defendants also initially noticed the depositions of Robert Yastishak and Paul Ferreira, who are the Director and Supervisor, respectively, of Investment Operations for the Treasurer's office. Defendants, however, have agreed to forgo those depositions if the Regents provide declarations from Messrs. Yastishak and Ferreira confirming the Regents' representations that they were involved only in investment operations. Defendants will reassess whether those depositions are necessary after the other depositions are completed.

appointed to the Board of Regents. Indeed, one full voting member of the Board is a student.
(Ex. K.)⁷

Moreover, the case law does not support requiring defendants to "first depose lower-level employees" when neither the decision to become a class representative nor the responsibility to ensure adequate representation of the class rests with low-level employees. The common thread running through the cases cited by the Regents is that the individuals the courts protected from deposition had no knowledge of relevant facts, or at least had much more limited knowledge than other lower-level individuals. *See FMR Corp. v. Alliant Partners*, No. 108,350, 1999 TTAB LEXIS 354, at *1 (Trademark Trial and Appeal Board July 15, 1999) (where courts have prohibited a party from initiating its discovery "at the top," the deponent has been shown "to have no direct knowledge of the facts of the case or no unique or superior knowledge of the facts"). Indeed, in most of the cases cited by the Regents, the senior officers had shown their lack of knowledge by affidavits or otherwise. *See, e.g., Mulvey v. Chrysler Corp.*, 106 F.R.D. 364 (D.R.I. 1985) (Lee Iacocca affidavit); *Consol. Rail. Corp. v. Primary Indus. Corp.*, No. 92 Civ. 4927 (PNL), 1993 U.S. Dist. LEXIS 12600 (S.D.N.Y. Sept. 10, 1993).

Here, in contrast, none of the individuals that defendants seek to depose have given such affidavits. The Regents do not and cannot say that Board members such as Ms. Hopkinson and Mr. Parsky have no knowledge of relevant facts or even that Mr. Heil is better able to address all of the issues relevant to class certification. Indeed, it is plain from the Regents' own public documents that Board members — particularly those on the Investment Committee — are directly involved in the Regents' investment policies and decisions. (Ex. J, I.) Even more important for class certification purposes, Board members would have been directly involved in

⁷ Similarly, Mr. Wedding is employed at a level equivalent to Mr. Heil.

the decision to sue, the decision to file suit as a class action rather than merely asserting an individual claim, the selection of class counsel, the decision to take on the responsibilities of a class representative, and the establishment of procedures to discharge those responsibilities effectively.⁸

Under similar circumstances, courts routinely allow similar depositions. For example, in *Naftchi v. New York University Medical Center*, 172 F.R.D. 130 (S.D.N.Y. 1997), the plaintiff sued the university, dean, and others for discrimination. The court allowed the plaintiff to depose the dean because the dean could not claim that he knew nothing about the decisions, or that he had no information pertinent to the lawsuit or that could lead to relevant evidence. *Id.* at 132-33. Similarly, in *Six West Retail Acquisition, Inc. v. Sony Theatre Mgmt. Corp.*, 203 F.R.D. 98 (S.D.N.Y. 2001), the court allowed the deposition of the Chairman and CEO of Sony Corp., the Chairman and CEO of Sony Corp. of America, and a former Deputy President of Sony Corp. of America who was then a senior official at Sony Corp. *Id.* at 101. The court noted that, as here, the proposed deponents had unique knowledge of issues related to the claims. *Id.* at 105. The Regents here have made no claim supported by affidavits to the contrary.

Even the Regents' own authorities undermine their position. For example, in *Consolidated Rail Corp.*, 1993 U.S. Dist. LEXIS 12600, at *2, the court stated that it is only when other witnesses have the same knowledge that a court may preclude the redundant deposition of a highly-placed executive. *Id.* at *2-3. Here, however, the Regents have not

⁸ The Regents cannot even argue that Mr. Russ, the Treasurer, had no role in buying or selling relevant securities. Mr. Russ was the Treasurer for a substantial period of time while Enron stock was being held and was the individual who approved the sales. Finally, the Regents have not identified anyone other than Mr. Wedding who can testify about the decision-making process and risk factors the Regents analyzed that led to the decision not to purchase certain Enron fixed income securities while purchasing Enron stock.

tendered any other witnesses with the same knowledge as the Board members. Certainly Mr. Heil does not claim to have that knowledge.

The cases cited by the Regents are inapposite for other reasons as well. They are typically cases by individual plaintiffs seeking to depose high-level officers of corporate *defendants* or *third parties*.⁹ Those officers did not bring their company into court by choice and thus their decisions on that topic were not at issue. None of the cases relied on by the Regents involve a plaintiff seeking to avoid its own deposition.

This is an important distinction. The Regents are an institutional plaintiff alleging well over \$100 million in damages. The Regents' Board made a conscious decision not only to file a lawsuit but to file it as a class action and take on the burden of acting as a class representative. Having consciously and willingly chosen to act in that capacity and take on those responsibilities, the individuals who made those decisions cannot now hide from being deposed about what the basis for their decision was, whether they are committed to representing the class adequately, and how they are discharging those responsibilities. All of these issues are subject to examination and directly involve the individuals identified above. Any claim of ignorance on these points undermines the Regents' adequacy as a class representative. Likewise, these individuals' very unwillingness to be deposed on the decision to become a class representative calls into question their commitment to the litigation.

This case is nothing like *Salter v. Upjohn Co.*, 593 F.2d 649 (5th Cir. 1979), which the Regents cite as their "seminal case." *Salter* did not involve a high-level decision by an institution to take on the role of a class representative asserting one of the largest securities fraud

⁹ See, e.g., *Am, Sterilizer Co. v. Surgikos, Inc.*, No. 4-89-238-Y, 1992 U.S. Dist. LEXIS 6347 (N.D. Tex. Apr. 8, 1992) (plaintiff sought information from a third party that could be obtained directly from defendant).

class action claims in history; it was an ordinary personal injury case. Moreover, the plaintiff in *Salter* sought to depose the defendant's president, who had no direct knowledge of the facts. *Id.* at 650. Even under those circumstances, the Fifth Circuit pointed out that "[i]t is very unusual for a court to prohibit the taking of a deposition altogether and absent extraordinary circumstances, such an order would likely be in error." *Id.* at 651 (citation omitted).¹⁰ This Court should heed the Fifth Circuit's warning and should not prohibit the depositions of the Regents sought here.

**D. The Regents Have No Basis For A Blanket Objection To
Any Institutional Class Certification Depositions In Houston.**

Defendants have already expressed their willingness to "negotiate mutually convenient ... locations" for depositions. (Ex. A (Markel letter to Hodges dated 7/31/02).) Apparently, that was not enough. The Regents complain that having numerous attorneys attend depositions will result "in truly exorbitant attorneys' fees that will diminish officers' and directors' insurance policies..." (Regents' Mot. at 4), apparently failing to recognize that the number of attorneys is directly correlated to the number of defendants they chose to sue.¹¹ But beyond that fact, the Regents' professed concern for the cost of this litigation is disingenuous. The Regents ask this Court to require each deposition to be conducted near each plaintiff's residence or place of business (see Regents' Mot. at 11), thus *maximizing* the potential expense of any depositions. It is certainly more expensive for defendants' counsel to travel around the country for depositions

¹⁰ Similarly, *Mulvey*, 106 F.R.D. at 365, also cited by the Regents, was an individual personal injury case resulting from an allegedly defective fuel system. In *Mulvey*, the plaintiffs sought to depose Lee Iacocca, Chairman of the Board of Chrysler Corp., even though Mr. Iacocca had given an affidavit expressing ignorance of facts sought by plaintiffs. *Id.* at 366. Thus, unlike here, there was no valid basis for taking Mr. Iacocca's deposition.

¹¹ In any event, the number of lawyers attending depositions has not proven to be an issue in the *Titile* class depositions, which have had only 4-5 attorneys in attendance. Moreover, the Regents have shown no entitlement to a dime from defendants' insurance policies; defendants' defense costs therefore are not the Regents' concern.

than for the plaintiffs' representatives to travel to a geographically-central location such as Houston, the forum in which plaintiffs brought this suit, or another mutually-agreeable location that would allow depositions to be scheduled back-to-back. Defendants have been wholly reasonable in their negotiations about where the depositions will be conducted.

Having selected Houston as the forum, plaintiffs cannot complain about having to appear for deposition in the Southern District of Texas. "As a normal rule plaintiff will be required to make himself or herself available for examination in the district in which suit was brought. Since plaintiff has selected the forum, he or she will not be heard to complain about having to appear there for a deposition." 8A Charles A. Wright, Arthur R. Miller & Richard L. Marcus, *Federal Practice and Procedure* § 2112 (2d ed. 1994) (footnote omitted).¹² See also *Sykes Int'l, Ltd. v. Pilch's Poultry Breeding Farms, Inc.*, 55 F.R.D. 138, 139 (D. Conn. 1972) (requiring officers of corporate plaintiff to appear in forum selected by plaintiff). By voluntarily selecting a forum, plaintiffs "are in no position to complain of costs of discovery." *In re SciMed Life Sec. Litig.*, No. 3-91-575, 1992 U.S. Dist. LEXIS 22144, at *4-5, 1992 WL 413867 (D. Minn. Nov. 20, 1992).¹³ This is unlike cases relating to forcing defendants to appear where they have

¹² This rule is applied even to require plaintiffs residing outside the United States to travel to their chosen forum. *In re SciMed Life Sec. Litig.*, No. 3-91-575, 1992 U.S. Dist. LEXIS 22144, at *4 n.1, 1992 WL 413867 (D. Minn. Nov. 20, 1992).

¹³ The Regents rely on *Operative Plasterers' & Cement Masons' Int'l Ass'n v. Benjamin*, 144 F.R.D. 87, 91 (N.D. Ind. 1992), for the general rule that depositions of an organization should be taken at the organization's principal place of business unless justice requires otherwise. But the case goes on to say that "it is also well-established that 'a plaintiff having selected a particular forum for the adjudication of his case should be prepared to answer a notice of deposition in that locality'..." *Id.* (citations omitted). It is only where the plaintiff has no choice of forum that this principle loses weight. *Id.* In this case, however, the plaintiffs selected their forum. Further, unlike the depositions sought in *Operative Plasterers'* of individuals who did not have personal knowledge of actions alleged in the complaint, the depositions sought by the bank defendants directly relate to plaintiffs' typicality and adequacy for class certification — something uniquely in the proposed deponents' personal knowledge.

been sued as they have no choice in the matter.¹⁴

E. The Documents Requested Are Discoverable.

As discussed above, discovery of relevant, non-privileged material is necessary before the rigorous inquiry into class certification begins. Nevertheless, the Regents seek a protective order to avoid producing several categories of requested documents relevant to class certification.¹⁵ The Regents, however, never conferred with defendants about any of the objections to the document requests as required by both the Federal and Local Rules. The Regents' motion for a protective order is thus premature and should not be heard until it has been established that the parties conclude that they are unable to resolve any disagreement on their own. *See* Fed. R. Civ. P. 26(c) (protective order must be "accompanied by a certification that the movant has in good faith conferred or attempted to confer with other affected parties in an effort to resolve the dispute without court action"); Local Rule 7.1D (opposed motion shall "contain an averment that (1) The movant has conferred with the respondent and (2) Counsel cannot agree about the disposition of the motion"); *Kidwiler v. Progressive Paloverde Ins. Co.*, 192 F.R.D. 193, 196-97 (N.D. W. Va. 2000) (dismissing discovery motion for failure to confer prior to filing).

Even if the Court nonetheless considers plaintiffs' objections, the Regents' motion should still be denied. As discussed below, the documents sought in document Request Nos. 9, 15, and

¹⁴ Moreover, plaintiffs' own authorities hold that, to the extent depositions are not conducted in Houston, they should be at plaintiffs' expense. In *Consolidated Rail*, cited by the Regents (Regents' Mot. at 8), the court allowed plaintiff's employees to be deposed at their place of business rather than where suit was brought, but the court required plaintiff to pay the cost of doing so: "Since Conrail, as the plaintiff, would normally be expected to produce its witnesses for deposition in the forum district, it shall initially bear the costs of conducting the depositions in Philadelphia [plaintiff's principal place of business], including the travel and accommodation expenses of Primary's counsel, as well as his reasonable attorney's fees." 1993 U.S. Dist. LEXIS 12600, at *4.

¹⁵ In this regard, the Regents not only seek a protective order on their own behalf but also on behalf of all other plaintiffs. It is unclear why the Regents believe they have standing to do so.

16 are not privileged and are properly discoverable because they are relevant to determining whether the adequacy and typicality requirements of Rule 23 are met in this case.

1. The Regents' Trading Records are Relevant to Class Certification.

The Regents object to document Request No. 16, which seeks institutional plaintiffs' documents relating to all trading activity in Enron's stocks and bonds and their general investment procedures for all stocks. Request No. 15, to which the Regents also object, seeks non-institutional plaintiffs' trading activity for all positions in securities, investments, and financial contracts since October 1, 1997.

a. Trading Records in Enron-Related Securities, Investments, or Contracts

As a matter of law, defendants are entitled to discovery of any information plaintiffs have regarding their transactions in Enron stock, regardless of quantity. *See* 15 U.S.C. § 78u-4(a)(2)(A). The PSLRA specifically requires a plaintiff to reveal all of its sales and purchases of a defendant company's stock. *Id.* The Regents fail to cite any authority to the contrary (and we are aware of none). Thus, plaintiffs' trading histories with Enron are relevant and discoverable, and the motion for a protective order relating thereto should be denied.

b. Non-Institutional Plaintiffs' Other Trading Records and Investment Procedures of Institutional Plaintiffs

Document Request No. 15 requests each non-institutional plaintiff to produce all trading activity for all positions in securities, investments, and financial contracts since October 1, 1997. Document Request No. 16 seeks institutional investors' general investment procedures for all stocks. These records are relevant to the issue of typicality because they will demonstrate plaintiffs' sophistication in investing. The Fifth Circuit has held that an investor's sophistication can raise a unique defense, rendering a plaintiff atypical. *Garonzik v. Shearson Hayden Stone, Inc.*, 574 F.2d 1220, 1221 (5th Cir. 1978); *see also Warren v. Reserve Fund, Inc.*, 728 F.2d 741,

747 (5th Cir. 1984). In *Warren*, the Court considered whether an investor's financial sophistication caused individual defenses to predominate. The Court concluded that the possible argument that the investor did not exercise due diligence in relying on reckless omissions or misrepresentations created a sufficiently unique issue to bar class certification: "While the availability or ultimate success of this defense in Warren's individual cause of action is not certain, we have held in the past that the presence of this characteristic peculiar to the named plaintiff does present a sufficient question of typicality to justify a district court's decision to deny class certification." *Warren*, 728 F.2d at 747. Numerous other courts have found that a plaintiff's "sophistication and trading strategies" in investments other than a defendant's stock are relevant to the class certification inquiry.¹⁶

The sophistication of the named plaintiffs, both individuals and institutions, is especially relevant where, as here, plaintiffs allege a fraud on the market theory.¹⁷ In such cases, defendants "should have an opportunity to rebut the presumption, using information obtained through discovery of investment history and background." *SciMed Life*, 1992 U.S. Dist. LEXIS 22144, at *7. The fraud on the market presumption of reliance may be rebutted "by any showing

¹⁶ See, e.g., *Degulis v. LXR Biotechnology, Inc.*, 176 F.R.D. 123, 125-126 (S.D.N.Y. 1997) (evidence of an investor's sophistication and strategy is relevant to the issue of whether the investor relied upon a defendant's alleged misrepresentations when purchasing the defendant's securities); *Elster v. Alexander*, 74 F.R.D. 503, 505 (N.D. Ga. 1976) ("plaintiff's ownership of other securities ... is best deemed relevant and discoverable"); *Epstein v. Am. Reserve Corp.*, No. 79 C 4767, 1985 U.S. Dist. LEXIS 15842, at *10 (N.D. Ill. Sept. 18, 1985) (stock ownership history relevant to typicality or adequacy because it could reveal plaintiffs' sophistication and experience in securities matters); *In re ML-Lee Acquisition Fund II, L.P.*, 149 F.R.D. 506, 508 (D. Del. 1993) (trading history produced to show possible unique defenses affecting typicality); see also *Goldman v. Alhadeff*, 131 F.R.D. 188 (W.D. Wash. 1990) (compelling production of information related to history of securities trading (list of stocks and/or securities traded, including number of shares owned and dates of acquisition and sale)).

¹⁷ See *Roseman v. Sports & Recreation*, 165 F.R.D. 108, 112 (M.D. Fla. 1996) ("The plaintiffs' investment history and background is relevant to the adequacy issue."); *SciMed*, 1992 U.S. Dist. LEXIS 22144, at *9 (permitting discovery of investment history at class certification stage in fraud on the market case); *In re Grand Casinos, Inc. Sec. Litig.*, 181 F.R.D. 615, 619-20 (D. Minn. 1998) (information pertaining to the general investment histories of the plaintiffs is permitted in a case claiming fraud on the market).

that severs the link between the alleged misrepresentation and either the price received (or paid) by the plaintiff, or his decision to trade at a fair market price." *In re Grand Casinos, Inc. Sec. Litig.*, 181 F.R.D. 615, 619 (D. Minn. 1998). Information from plaintiffs' recent investment histories could show that plaintiffs traded pursuant to a strategy that was independent of the stock price of the various securities. *See Grand Casinos*, 181 F.R.D. at 619-20. This information would rebut the presumption of reliance on the integrity of the market and would demonstrate that plaintiffs are subject to unique defenses, rendering them atypical and inadequate class representatives. *Id.* at 619. Thus, plaintiffs' knowledge and experience in the securities industry is relevant, and defendants' document requests related to plaintiffs' trading histories, sophistication and experience are proper.

2. Documents Relating to Plaintiffs' Retention of Counsel are Relevant to the Adequacy Requirement and are not Privileged.

The Regents seek a protective order for document Request No. 9, which seeks information relating to plaintiffs' decision to retain Milberg Weiss, including engagement letters, the nature of legal services to be provided, previous attorney-client relationships, social contacts, and documents relating to the payment of costs and fees. Further, the Regents seek to avoid producing financial documents, which are also encompassed in Request No. 9. While the Regents' precise objections to these requests are not clear — a matter further complicated by the Regents' failure to meet and confer regarding these objections — the Regents appear to object that the requests seek both privileged and irrelevant information. (*See Regents' Mot.* at 12-14.) However, the law is clear that both categories of documents are relevant to class certification and are discoverable.

a. Plaintiffs' Retention of Milberg Weiss

The Regents' reliance on assertions of privilege and irrelevance in response to discovery requests relating to plaintiffs' decision to retain Milberg Weiss is misplaced. The Fifth Circuit has held that a plaintiff's relationship with, and ability to control, class counsel as well as counsel's adequacy to represent a class are highly relevant to whether a class should be certified. *See Compaq*, 257 F.3d at 483. Under the rigors of *Compaq*, all of defendants' outstanding discovery requests relating to plaintiffs' relationship with Milberg Weiss are relevant to determining whether plaintiffs have met the higher threshold established by the PSLRA.

Further, these materials are not privileged. The attorney-client privilege protects only confidential communications between the client and lawyer made for the purpose of obtaining legal advice. *United States v. El Paso Co.*, 682 F.2d 530, 538 (5th Cir. 1982). "There is generally no attorney-client privilege as to the identity of the client, conditions of employment or matters involving receipt of fees." *Klein v. Miller*, 82 F.R.D. 6, 9 (N.D. Tex. 1978). The policy behind the attorney-client privilege, encouraging people to seek legal advice, is not affected by a rule that fee information is not privileged since disclosure of the terms of the fee agreement would not cause a party to avoid seeking legal advice. It is now a "settled principle" "that the attorney-client privilege shields the identity of a client or fee information only where revelation of such information would disclose other privileged communications such as the confidential motive for retention." *In re Grand Jury Subpoena for Attorney Representing Criminal Defendant Reyes-Requena*, 913 F.2d 1118, 1125 (5th Cir. 1990) (footnote omitted); *see also Humphreys, Hutcheson, & Moseley v. Donovan*, 755 F.2d 1211, 1219 (6th Cir. 1985) ("In general, the fact of legal consultation or employment, clients' identities, attorneys' fees, and the scope and nature of employment are not deemed privileged."); *Ettinger v. Merrill Lynch, Pierce,*

Fenner & Smith, Inc., No. 84-3925, 1990 U.S. Dist. LEXIS 6731, at *6-8 (E.D. Pa. May 31, 1990) ("The terms or conditions of employment of a particular attorney are not privileged.").

Thus, all the materials sought by the defendants are discoverable. The engagement letter requested by defendants should be produced since it does not contain legal advice. It is also well-established that privilege does not encompass the nature of legal services and the existence of prior attorney-client relationships between plaintiffs and plaintiffs' counsel. Further, defendants' inquiry into social relationships cannot be claimed as privileged information as these relationships are relevant to determining the adequacy of counsel and are not confidential in nature. In *Tanzer v. Sharon Steel Corp.*, No. 77 Civ. 1632-CSH, 1979 U.S. Dist. LEXIS 11535, at *42-43 (S.D.N.Y. June 22, 1979), the defendant was entitled to develop all the circumstances surrounding the business relationship between attorney and client because doubts about the independence of counsel affect the client's adequacy to be a class representative. Suggested interdependence has resulted in the denial of class certification. *Id.* For these reasons, the Regents' motion for a protective order should be denied as to Request No. 9.

**b. Documents Relating to Plaintiffs'
Ability to Finance the Litigation**

Plaintiffs have also refused to respond to requests regarding their fee arrangements and expected costs of litigation, although plaintiffs' ability to finance the litigation is clearly relevant to the adequacy determination. Since plaintiffs' financial wherewithal goes directly to protecting the interests of absent class members, a plaintiff who is financially unable to bear the costs of adequate class representation is not an adequate representative. *Held v. Mo. Pac. RR Co.*, 64 F.R.D. 346, 350 (S.D. Tex. 1974). "[I]t must appear to the Court that the plaintiff, as representative, will vigorously prosecute the interests of the class through qualified counsel." *Elster*, 74 F.R.D. at 504 (citing *Gonzales v. Cassidy*, 474 F.2d 67, 72 (5th Cir. 1973)).

Whether a plaintiff understands the fee agreement and expects to pay for costs, expenses or fees directly is a factor of the adequacy requirement. *Klein*, 82 F.R.D. at 8-9 ("inquiry into Plaintiffs' financial status and fee arrangement is relevant to the question of Plaintiffs' ability to protect the interests of potential class members by adequate funding of this lawsuit..."). To that end, fee agreements with class counsel have specifically been determined "relevant and discoverable under [Fed. R. Civ. P.] 23(a)(4)." *Ferraro v. Gen. Motors Corp.*, 105 F.R.D. 429, 430, 432 (D.N.J. 1985) ("Whether the plaintiff himself bears the financial burden, shares it with others, agrees to reimburse others, or agrees to be reimbursed by others are circumstances which should be revealed and considered in connection with the adequacy of the class representative."); *see also Nat'l Auto Brokers Corp. v. Gen. Motors Corp.*, 376 F. Supp. 620, 637-38 (S.D.N.Y. 1974) (financial condition relevant to decision on class certification despite contingency fee agreement with attorney); *Ralston v. Volkswagenwerk, A.G.*, 61 F.R.D. 427, 433-34 (W.D. Mo. 1973) (denying class certification where plaintiff was not shown to be able to finance the suit beyond the initial class notice because "[i]nadequate financing threatens the procedural and substantive interests of all members of the class").¹⁸ Accordingly, the plaintiffs' refusal to respond to defendants' requests regarding these issues is clearly inappropriate.¹⁹

¹⁸ While *Ferraro* and some other cases have refused discovery into the financial wherewithal of plaintiffs, these courts have done so on the basis of an agreement that class counsel will finance the costs of litigation. Here, plaintiffs have refused to provide any information on how this suit is being financed.

¹⁹ The Regents also complain of defendants' requests for plaintiffs' tax returns. Tax returns are not privileged and are discoverable. *ML-Lee Acquisition*, 149 F.R.D. at 508-09 (allowing discovery of tax returns and all documents setting forth each plaintiff's current net worth, assets, debts, other liabilities, and financial status, including financial statements and loan applications). The Regents' own cases are in accord. *See Maresca v. Marks*, 362 S.W.2d 299, 300-01 (Tex. 1962) (limiting production of income tax returns to relevant and material portions); *Tilton v. Marshall*, 925 S.W.2d 672, 683 (Tex. 1996); *see also Crane v. Tunks*, 328 S.W.2d 434 (Tex. 1959) (income tax returns are not wholly privileged documents but are subject to discovery to the extent relevance and materiality are shown).

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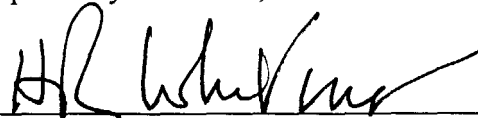
In sum, all of the defendants' outstanding discovery requests are reasonably calculated to lead to evidence showing that plaintiffs have not met the requirements of Rule 23, and therefore a class should not be certified in this action. Further, plaintiffs have no argument based upon relevance, privilege or other basis to avoid responding to these requests.

IV. CONCLUSION

For all of the foregoing reasons, the Regents' motion for a protective order is without merit and should be denied.

August 30, 2002

Respectfully submitted, '



Hugh R. Whiting
Attorney-in-Charge
Texas Bar No. 21373500
S.D. Admission No. 30188
David E. Miller
Texas Bar No. 14067150
S.D. Admission No. 27647
JONES, DAY, REAVIS & POGUE
600 Travis Street, Suite 6500
Houston, Texas 77002
Tel: (832) 239-3939
Fax: (832) 239-3600

David L. Carden
JONES, DAY, REAVIS & POGUE
222 E. 41st Street
New York, New York 10017-6702
Tel: (212) 326-3939
Fax: (212) 755-7306

Robert C. Micheletto
JONES, DAY, REAVIS & POGUE
77 West Wacker Drive, Suite 3500
Chicago, Illinois 60601-1692
Tel: (312) 269-3939
Fax: (312) 782-8585

Attorneys for Lehman Brothers Holdings Inc.

/s/ Gregory A. Markel
Gregory A. Markel (pro hac vice)
Attorney-in-Charge
Ronit Setton (pro hac vice)
Nancy Ruskin (pro hac vice)
BROBECK, PHLEGER & HARRISON LLP
1633 Broadway, 47th Floor
New York, New York 10019
Tel: (212) 581-1600
Fax: (212) 586-7878

Paul R. Bessette
Texas Bar No. 02263050
S.D. Tex. Bar No. 22453
BROBECK, PHLEGER & HARRISON LLP
4801 Plaza on the Lake
Austin, Texas 78746
Tel: (512) 330-4000
Fax: (512) 330-4001

Charles G. King
Texas Bar No. 11470000
S.D. Admission No.: 01344
KING & PENNINGTON LLP
711 Louisiana Street, Suite 3100
Houston, Texas 77002
Tel: (713) 225-8404
Fax: (713) 225-8488

Attorneys for Bank of America Corporation

/s/ Barry Abrams

Barry Abrams
Texas Bar No. 00822700
S.D. Admission No. 2138
ABRAMS SCOTT & BICKLEY, LLP
Chase Tower, 600 Travis, Suite 6601
Houston, Texas 77002
Tel: (713) 228-6601
Fax: (713) 228-6605

David H. Braff
Anthony M. Candido
Adam R. Brebner
(*Pro hac vice* motions pending)
SULLIVAN & CROMWELL
125 Broad Street
New York, New York 10004
Tel: (212) 558-4000
Fax: (212) 558-3588

Attorneys for Barclays PLC

/s/ Alan N. Salpeter

Alan N. Salpeter
Michele Odorizzi
Mark McLaughlin
MAYER, BROWN, ROWE & MAW
190 South LaSalle Street
Chicago, Illinois 60603
Tel: (312) 782-0600

William H. Knull, III
MAYER, BROWN, ROWE & MAW
700 Houston Street, Suite 3600
Houston, Texas 77002-2730
Tel: (713) 221-1651

***Attorneys for Canadian Imperial Bank of
Commerce***

/s/ Jacalyn D. Scott

Jacalyn D. Scott
SBN: 17899900
Eugene B. Wilshire
WILSHIRE, SCOTT & DYER, P.C.
3000 One Houston Center
1221 McKinney
Houston, Texas 77010
Tel: (713) 651-1221
Fax: (713) 651-0020

OF COUNSEL:

Brad S. Karp
Mark F. Pomerantz
Richard A. Rosen
Michael E. Gertzman
Claudia L. Hammerman
Jonathan H. Hurwitz
PAUL, WEISS, RIFKIND, WHARTON &
GARRISON
1285 Avenue of the Americas
New York, New York 10019-6064
Tel: (212) 373-3000
Fax: (212) 757-3990

Attorneys for Citigroup, Inc.

/s/ Lawrence D. Finder

Lawrence D. Finder
Attorney-in-Charge
Texas Bar No. 07007200
S.D. Admission No. 602
HAYNES and BOONE, LLP
1000 Louisiana Street, Suite 4300
Houston, Texas 77002-5012
Tel: (713) 547-2000
Fax: (713) 547-2600

OF COUNSEL:

Richard W. Clary
Julie A. North
CRAVATH, SWAINE & MOORE
Worldwide Plaza
825 Eighth Avenue
New York, New York 0019-7475
Tel: (212) 474-1000
Fax: (212) 474-3700

Attorneys for Credit Suisse First Boston Corp.

/s/ Joel M. Androphy

Joel M. Androphy
Texas Bar No. 01254700
B. Elizabeth Klein
Texas Bar No. 24032515
Wade T. Howard
Texas Bar No. 00787725
BERG & ANDROPHY
3704 Travis
Houston, Texas 77002
Tel: (713) 529-5622
Fax: (713) 529-3785

Lawrence Byrne
Owen C. Pell
Lance Croffoot-Suede
WHITE & CASE LLP
1155 Avenue of the Americas
New York, New York 10036-2787
Tel: (212) 819-8200
Fax: (212) 354-8113

Attorneys for Deutsche Bank AG

/s/ Richard Warren Mithoff

Richard Warren Mithoff
Attorney-in-Charge
Texas Bar No. 14228500
S.D. Admission No. 2102
MITHOFF & JACKS, L.L.P.
One Allen Center, Penthouse
500 Dallas Street, Suite 3450
Houston, Texas 77002
Tel: (713) 654-1122
Fax: (713) 739-8085

OF COUNSEL:

Charles A. Gall
Texas Bar No. 07281500
S.D. Admission No. 11017
James W. Bowen
Texas Bar No. 02723305
S.D. Admission No. 16337
JENKINS & GILCHRIST, A PROFESSIONAL
CORPORATION
1445 Ross Avenue, Suite 3200
Dallas, Texas 75202
Tel: (214) 855-4500
Fax: (214) 855-4300

Bruce D. Angiolillo
Thomas C. Rice
David J. Woll
Jonathan K. Youngwood
SIMPSON THACHER & BARTLETT
425 Lexington Avenue
New York, New York 10017
Tel: (212) 455-2000
Fax: (212) 455-2502

Attorneys for J.P. Morgan Chase & Co.

/s/ Taylor M. Hicks
Taylor M. Hicks
Texas Bar No. 09585000
S.D. Admission No. 3079
Stephen M. Loftin
Texas Bar No. 12489510
S.D. Admission No. 12676
HICKS THOMAS & LILIENSTERN, LLP
700 Louisiana, Suite 1700
Houston, Texas 77002
Tel: (713) 547-9100
Fax: (713) 547-9150

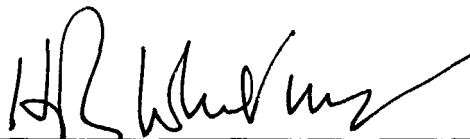
Herbert S. Washer
James D. Miller
Ignatius A. Grande
CLIFFORD CHANCE ROGERS
& WELLS, LLP
200 Park Avenue, Suite 5200
New York, New York 10166-0153
Tel: (212) 878-8000
Fax: (212) 878-8375

Robert Serio
Mitchell A. Karlan
Marshall R. King
GIBSON, DUNN & CRUTCHER, L.L.P.
200 Park Avenue
New York, New York 10166-0193
Tel: (212) 351-4000
Fax: (212) 351-4035

Attorneys for Merrill Lynch & Co., Inc.

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing instrument was served on all counsel on the attached service list electronically via the www.esl3624.com website or as otherwise indicated in the Court's prior orders.

A handwritten signature in black ink, appearing to read 'H R Whiting', is written over a horizontal line.

HUGH R. WHITING
Attorney for Defendant
Lehman Brothers Holdings Inc.

The Service List

May be Viewed in

the Office of the Clerk

The Exhibit(s) May
Be Viewed in the
Office of the Clerk